SUPREME COURT, U. S.

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IN THE

Supreme Court

of the

United States

OCTOBER TERM, A. D. 1965

No. 223

RAYMOND CARTER,
Petitioner,

VS.

ZULA WINTER, also known as MRS. A. E. WINTER, and THERESA HOENOW,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(c) QUESTIONS PRESENTED FOR REVIEW:

We do not agree with Petitioner that the questions presented for review (Petition p. 2) are as stated by him. On the contrary, we respectfully suggest that the only question is:

1. Will this Court entertain a Petition For Certiorari to the Supreme Court of Illinois to review its decision based upon a question of local Illinois law in which there is no Federal question involved?

(e) STATEMENT OF THE CASE:

This case does not involve a situation where "Petitioner was proceeding south in the outside lane of traffic when his automobile was hit in the rear by the automobile being operated by Theresa Hoenow and proceeding in the same direction" (Petition p. 3). It involves a case where the defendant Hoenow was proceeding south in the outer lane of a preferential highway when the plaintiff suddenly emerged from a private driveway on the east side thereof, drove across and into the defendants' lane of travel immediately in front of her and turned to the south, whereupon, the left rear of his car was struck by the right front corner of the defendants' car which was then straddling the line between the two southbound lanes in an effort to avoid the collision.

In the Trial Court our motions for directed verdict and for judgment notwithstanding the verdict were overruled and judgment was entered for the plaintiff on a jury's verdict. Although in its Opinion the Appellate Court stated that there was sufficient evidence for the Trial Court to deny the motion for directed verdict, it found that the verdict was against the manifest weight of the evidence both on the question of contributory negligence and of proximate cause, and reversed, without remandment. Upon plaintiff's appeal to the Supreme Court of Illinois, we contended that the *judgment* of the Appellate Court reversing the Trial Court's judgment was correct, but that the *reasons* given therefor in the Opinion were incorrect in that the plaintiff was guilty of contributory negligence

as a matter of law and the Trial Court should have directed a verdict; that therefore there was no constitutional question involved. (Appellee's Brief, Add. Rec. 3)

The Supreme Court held that, based upon the plaintiff's own testimony, viewed in the light of all the other testimony, the plaintiff was guilty of contributory negligence as a matter of law, and the Trial Court should have directed a verdict for the defendants; that the Appellate Court's reversal of the judgment without remandment, was a correct decision, although its reasons given therefor were incorrect; that since the Appellate Court's *decision* was correct, the Supreme Court affirmed.

Since the Supreme Court of Illinois did, in fact, review the entire case and wrote an Opinion thereon, it makes no difference whether such review was by reason of an appeal from the Appellate Court as a matter of right, or was an allowed Petition for Leave to Appeal (Petition p. 6).

SUMMARY OF ARGUMENT

I.

This Court will not exercise its discretion to review a decision of the Illinois Supreme Court in a civil automobile accident case where no Federal question is involved but only the determination of a question of local State law. What constitutes negligence or contributory negligence in an automobile accident case is purely a matter of Illinois State law upon which the Federal Courts follow the interpretations of the State Supreme Court.

Under Illinois law, the plaintiff must affirmatively prove himself free from contributory negligence. He will be bound by his own judicial admissions. If he knowingly departs from a place of safety and enters a place of known danger, he is contributorily negligent as a matter of law and cannot recover for his injuries. If upon a consideration of all the evidence, all reasonable minds would come to the conclusion that the plaintiff's conduct was negligence which contributed to his injury, then the question of contributory negligence becomes a question of law for the Court, which should direct a verdict for the defendant.

In deciding this case, no constitutional right of the plaintiff was violated and no Federal question was involved.

II.

Plaintiff's own testimony that just before he entered the defendant's lane of traffic, he observed the defendant's car 30 to 40 yards away and travelling 75 to 80 miles per hour, yet he proceeded on into and turned into that lane, was a judicial admission which convicted him of contributory negligence as a matter of Illinois law. Such judicial admission was not overcome by any other evidence.

III.

This Court will not exercise its discretion to review the decision of the Illinois Supreme Court merely because such decision might be inconsistent with some prior decision of that Court, or because it might have been an erroneous decision.

IV.

For this Court to accept the principle urged by the petitioner it would have to hold that, regardless of the evidence or lack thereof, no State Court, under any circumstances, can ever direct a verdict for either party.

ARGUMENT

I.

WE RESPECTFULLY SUBMIT THAT THIS COURT WILL NOT EXERCISE ITS DISCRETION TO REVIEW A DECISION OF THE HIGHEST COURT OF A STATE WHERE THAT DECISION INVOLVES NO FEDERAL QUESTION BUT ONLY THE DETERMINATION OF A QUESTION OF LOCAL STATE LAW.

Supreme Court Rule 19.

A. The United States Supreme Court will not review a judgment of a State Court if the record shows that it was or may have been rendered upon a ground which did not involve a federal question and which was sufficient to sustain it.

Herb v. Pitcairn, 324 U.S. 117, 125, 89 L. Ed. 789, 794;

Fox Film Corporation v. Muller, 296 U.S. 207, 210, 80 L. Ed. 158, 159;

Berea College v. Kentucky, 211 U.S. 45, 53, 53 L. Ed. 81, 85;

Ann. 309 U.S. 559, 84 L. Ed. 925, 941.

B. What constitutes negligence or contributory negligence in an automobile accident case for personal injuries is purely a matter of Illinois State law, and the Federal Courts uniformly accept the determination and interpretation thereof placed thereon by the highest State Court.

Erie R. R. Co. v. Tompkins, 304 U.S. 64, 78, 82 L. Ed. 1188, 1194.

1. *It is the law of Illinois that a person may not knowingly depart from a place of safety and enter a place of*

known danger and then recover for injuries occasioned thereby.

Illinois Central R. R. Co. v. Oswald, 338 Ill. 270, 275;

Wheat v. Baltimore & Ohio R. R. Co. (CCA 7), 262 F. 2d 289, 291; Cert. Denied, 359 U.S. 1005, 3 L. Ed. 2d 1034;

Albers v. Continental Grain Co. (CCA 7), 220 F. 2d 847, 849.

2. *It is the law of Illinois that a plaintiff must affirmatively prove that he himself was in the exercise of ordinary care for his own safety and was not himself guilty of negligence which proximately caused or contributed to his own injuries.*

Illinois Central R.R. Co. v. Oswald, 338 Ill. 270, 274;

Dee v. City of Peru, 343 Ill. 36, 41;

Beiter v. Erb (CCA 7), 259 F. 2d 911, 913; Cert. denied, 359 U.S. 953, 3 L. Ed. 2d 761. Rehearing denied 359 U.S. 981, 3 L. Ed. 931.

3. *It is the law of Illinois that a party will be bound by his own judicial admission.*

McCormick v. Haan, 20 Ill. 2d 75, 169 N.E. 2d 239;

Tennes v. Tennes, 320 Ill. App. 19, 50 N.E. 2d 132. Leave to appeal denied;

Huber v. Black & White Cab Co., 18 Ill. App. 2d 186, 151 N.E. 2d 641. Leave to appeal denied;

Waugh v. Cender, 29 Ill. App. 2d 408, 173 N.E. 2d 860. Leave to appeal denied;.

Nowak v. Schrimpf, 44 Ill. App. 2d 309, 194 N.E. 2d 547.

4. *It is the law of Illinois that, while ordinarily the questions of negligence, contributory negligence and proxi-*

mate cause are for the jury, if under the evidence in a particular case, the Court determines that all reasonable minds would come to only one conclusion, then each of those questions becomes a question of law for the Court, and the Court should take the case from the jury and direct a verdict.

Tucker v. New York, Chicago & St. Louis R. R. Co., 12 Ill. 2d 532, 147 N.E. 2d 376, 377;

Briske v. Village of Burnham, 379 Ill. 193, 39 N.E. 2d 976, 979;

Albers v. Continental Grain Co. (CCA 7), 220 F. 2d 847, 849.

5. *Where the plaintiff fails to prove some essential element of his case, Illinois has always recognized the right and the duty of the Court to take the case from the jury and to direct a verdict for the defendant.*

Sec. 68.1 Civil Practice Act (Ch. 110, para. 68.1 Ill. Rev. Stats. 1963).

6. *Both by decision and by the express terms of the Federal Rules of Civil Procedure the Federal Courts have recognized a similar right in those Courts.*

Rule 50, Federal Rules of Civil Procedure;

Moore v. Chesapeake & O. R. R. Co., 340 U.S. 573, 578, 95 L. Ed. 547, 551;

Rogers v. Mo. Pac. Railway Co., 352 U.S. 559, 564, 1 L. Ed. 2d 515, 519.

7. Where the highest Court of the State of Illinois has reviewed all of the evidence and the questions of law and has made a finding that, in the case at bar, the plaintiff by his own judicial admission and supported by a consideration of all the other evidence, knowingly left a place of safety and entered into a place of known danger, he has failed in his burden of proving himself in the exercise of

ordinary care for his own safety; that the plaintiff has therefore not made a submissible case to the jury and the Trial Court should have directed a verdict for the defendants; that the Appellate Court's decision reversing the Trial Court's judgment without remandment was therefore correct even though the reasons given in the opinion therefor were incorrect, and then affirming the Appellate Court decision; no constitutional right of the plaintiff has been violated. Only questions of Illinois law are involved, and the decision of the Illinois Supreme Court is completely supported by the Illinois Law and no Federal question was either involved or necessary to the determination of the case. Therefore, we respectfully submit that either this Court is without jurisdiction to review this case, or, in the alternative, this Court will not exercise its discretion to review this case.

8. The case at bar does not involve principles the settlement of which is of importance to the public as distinguished from that of the parties, and therefore no compelling reason exists for this Court to review this case.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 99 L. Ed. 897, 904.

9. The decision of the Illinois Supreme Court could also have been properly based upon the lack of proof of causal connection between the accident and the subsequent heart attack, but the Court found it unnecessary to pass on that question. (Petition p. 56.)

10. It having been unnecessary for the Illinois Supreme Court in arriving at its decision to consider any constitutional questions, that Court properly accepted review of the case on the basis of an allowed Petition for Leave to Appeal; properly disposed of the case; properly denied the Petition for Rehearing; and properly denied the Motion to Reconsider.

II.

THE EVIDENCE WHOLLY FAILED TO ESTABLISH THE ESSENTIAL ELEMENT OF THE PLAINTIFF'S CASE THAT HE HIMSELF WAS IN THE EXERCISE OF ORDINARY CARE AND WAS NOT HIMSELF GUILTY OF ANY NEGLIGENCE WHICH APPROXIMATELY CAUSED OR CONTRIBUTED TO HIS OWN INJURIES.

Plaintiff's own testimony that just before he entered the defendant's lane of travel at a speed of 35 miles per hour, he observed the defendant's car 30 to 40 yards away (90 to 120 feet) and travelling at a speed of 75 to 80 miles per hour, is sufficient to convict him of contributory negligence as a matter of law. Prior to entering that lane of travel, the plaintiff was in a place of safety; yet, knowing that the defendant's car was only about 100 feet away, travelling at 75 to 80 miles per hour or less than two seconds away, he deliberately left that place of safety and entered upon a place of danger, which caused his alleged injuries.

Plaintiff's Petition would give this Court the erroneous impression that the plaintiff testified only once to those facts and in so doing, stated that his testimony was only a "guess" (Petition 22). Counsel deliberately omits any reference to the other *two* times when the plaintiff testified to the same set of facts in a positive manner (Supp. Abst. 1-2) (Add'l Rec. 2).

Also, plaintiff's own testimony that he observed the defendant's automobile travelling from a point 400 yards away to a point 30 to 40 yards away while he himself travelled only 20 yards to the place where he turned into the defendant's lane of traffic, which would make the defendant travelling approximately 20 times as fast as the defendant, or over 200 miles per hour, is both testimony of

a physical impossibility and is further a judicial admission that before he entered defendant's lane of travel, he knew that he was deliberately placing himself in a position of known danger.

The Illinois Supreme Court, before accepting the plaintiff's own testimony as to speeds and relative distances, also reviewed the testimony of all of the other witnesses. It found it necessary to completely reject the testimony of plaintiff's other witnesses Mary Carter (his wife) and Luke Carter (his brother) because such testimony was also a physical impossibility. Mary Carter's testimony that as they entered defendant's lane of travel at 35 miles an hour defendant's car was some 250 to 300 yards away (750 to 900 feet), yet, while plaintiff travelled approximately 140 feet, the defendant travelled approximately 900 feet or approximately 6 times as fast would have placed defendant's speed at over 200 miles per hour. And this testimony is without consideration of the fact that the defendant had applied her brakes and laid down 112 feet of skidmarks in attempting to stop, while plaintiff's car remained in motion. Brother Luke Carter testified that while the plaintiff travelled approximately 200 feet at 35 miles per hour, the defendant travelled over one-quarter of a mile (in six seconds) which would also require a speed of over 200 miles per hour, and this without considering the application of defendant's brakes, and that the plaintiff was still in motion. Thus, plaintiff's own judicial admission was not controverted nor emasculated by a consideration either of his other testimony or of the testimony of his other witnesses, and consequently, he was bound by it. Such testimony convicted the plaintiff of contributory negligence as a matter of law.

It is interesting to note that the plaintiff's own testimony as to the distance the defendant's car was from him at the

time he entered its lane of travel (90 to 120 feet) is corroborated by the testimony of the defendant Hoenow (100 to 125 feet) Brown (100 to 125 feet) and Engelbach (50 feet).

On page 23 of the Petition, plaintiff's counsel states that it was an undisputed fact that the point of impact was 169 feet south of the driveway. Such statement is erroneous. Only Trooper Merrifield placed the point of impact 169 feet south of the driveway, and he located it from memory, some three years after the accident when he revisited the scene accompanied by plaintiff's counsel, and it was only upon the basis of his location of the point of impact that plaintiff's counsel assumed that the skidmarks commenced 57 feet south of the driveway. Plaintiff himself placed the point of impact 120 to 130 feet south. His wife, Mary Carter, 129 to 130 feet south; his brother, Luke Carter, 150 to 160 feet south; and the independent witness, Engelbach, at a point opposite the rear of his 50 foot long unit which was parked with its front end immediately south of the driveway.

III.

IT IS RESPECTFULLY SUBMITTED THAT THE UNITED STATES SUPREME COURT WILL NOT REVIEW THE DECISION OF THE HIGHEST STATE COURT MERELY BECAUSE SUCH DECISION MIGHT BE INCONSISTENT WITH SOME PRIOR DECISION OF THAT COURT OR BECAUSE IT MIGHT HAVE BEEN ERRONEOUSLY DECIDED.

Patterson v. Colorado, 205 U.S. 454, 461, 51 L. Ed. 879, 880;

Beck v. Washington, 369 U.S. 541, 554, 8 L. Ed. 2d 98, 110.

On pages 28-29 of the Petition counsel argues that

Pennington v. McLean, 16 Ill. 2d 577, 158 N.E. 2d 624, which he states cannot be distinguished from the case at bar, holds that *Tucker v. New York, Chicago and St. Louis Railroad Co.*, 12 Ill. 2d 532, 147 N.E. 2d 376; *Dee v. City of Peru*, 343 Ill. 36; *Illinois Central R. R. Co. v. Oswald*, 338 Ill. 270; and *Hering v. Hilton*, 12 Ill. 2d 559, 147 N.E. 2d 311 are not applicable.

We respectfully submit that on page 29 of the Petition, his counsel suggest the element which distinguishes the Pennington case from the case at bar, where he says with reference to the case at bar:

> . . . "It is undisputed that the plaintiff was aware of the approach of the defendant's vehicle."

Yes, plaintiff was not only aware of the approach of the defendant's automobile, but, under his own testimony, it was less than two seconds away when he deliberately drove in front of it and turned in its lane of travel.

But, even if Pennington is a holding contrary to the holding in the case at bar, such inconsistency is not such a compelling reason as will require this Court to review this case.

IV.

IT IS RESPECTFULLY SUBMITTED THAT FOR THIS COURT TO ACCEPT THE PRINCIPLE URGED BY THE PETITIONER, IT WOULD BE COMPELLED TO HOLD THAT, REGARDLESS OF THE EVIDENCE OR LACK THEREOF, NO STATE COURT UNDER ANY CIRCUMSTANCES CAN EVER DIRECT A VERDICT FOR EITHER PARTY.

Let us consider a few examples in order to demonstrate the absurdity of such an argument. Illinois does not recognize comparative negligence; contributory negligence on the part of the plaintiff is a complete bar to recovery. Suppose

then that a plaintiff, approaching a preferential highway at 90 miles per hour, observes heavy traffic on that highway travelling at high but lawful speeds and within a few feet of the intersection, closes his eyes, and, without stopping, enters and drives directly in front of or into the side of a car on that highway, would this Court say that the question of plaintiff's contributory negligence and of the alleged negligence of the driver of the adverse vehicle were solely within the determination of the jury and that no Court could rightfully take the case from the jury? Or, instead of a preferential highway, let us make it a railroad crossing with a train rapidly approaching and within a few feet of the crossing when the plaintiff deliberately disregards crossing gates and crossing lights and deliberately drives in front of the train. Would this Court say that no State Court could rightfully take that case from the jury?

And since there is no Federal Negligence Law but the Federal Courts follow the law of the State wherein the accident occurred, would not the Federal Court, in a diversity case, under such a state of facts, direct a verdict for the defendant? The aforesaid examples are different only in degree from the situation in the case at bar. In this case, the plaintiff, under his own testimony and corroborated by all of the evidence, except that which is contrary to physical law, knowingly drove his comparatively slow-moving vehicle into the defendant's lane of traffic when the defendant's car was less than two seconds away. Plaintiff did not try to *cross* the defendant's lane of travel; he drove into it and turned immediately in front of the defendant's car. As held by the Illinois Supreme Court, all reasonable minds must agree that the plaintiff was guilty of contributory negligence as a matter of law, and that this was a proper case in which the Court should interfere to prevent a gross miscarriage of justice.

Petitioner suggests (Petition pp. 32-33) that for the Court to take away this badly injured plaintiff's verdict is the taking of his property without due process of law. But the argument applies with equal force to the taking of the defendant's property without due process of law by a Court permitting an improper verdict to stand.

V.

SUMMARY

It is respectfully submitted that this Court will not and should not, exercise its discretion to review a decision of the highest court of the State of Illinois decided solely upon a question of local State law and where no Federal question was involved or necessary to its decision. The Illinois Supreme Court properly held that under the evidence and the Illinois law, the plaintiff was guilty of contributory negligence as a matter of law which bars any recovery by him. In such a case no constitutional question, either under the Constitution of the State of Illinois or the Constitution of the United Sates, is involved. This Court will not and should not review the evidence and substitute its own judgment for that of the Illinois Supreme Court, nor hold that under no circumstances can a State Court direct a verdict.

We therefore respectfully pray that this Court deny the Petition For Writ of Certiorari.

Respectfully submitted,

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